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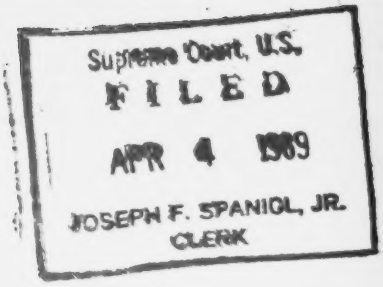

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

TOMMIE JEAN TRUESDALE,
PETITIONER

v.

UNIVERSITY OF NORTH CAROLINA, ET AL.,
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

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QUESTION PRESENTED

Assuming that a state is a person within the meaning of 42 U.S.C. sec. 1983, does the Supremacy Clause prohibit a state from insulating itself, its agencies, and its officials, from liability under that section by invoking state common law sovereign immunity?

LIST OF PARTIES

The parties to the proceedings below are the petitioner Tommie Jean Truesdale and the Respondents University of North Carolina, Winston-Salem State University, James W. Lewis and Robert Fenning.

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No._____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

TOMMIE JEAN TRUESDALE,
PETITIONER

v.

UNIVERSITY OF NORTH CAROLINA, ET AL.,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE
NORTH CAROLINA COURT OF APPEALS

The petitioner Tommie Jean Truesdale respectfully prays that a writ of certiorari issue to review the judgment and opinion of the North Carolina Court of Appeals, dated September 6, 1988.

DECISIONS BELOW

The order and judgment of the Forsyth County Superior Court is not reported; it is reprinted in the Appendix at 1a-4a.

The opinion of the North Carolina Court of Appeals is reported at 91 N.C. App. 186, 371 S.E. 2d 503 and is reprinted in the Appendix at 5a-35a. The order of the North Carolina Supreme Court dismissing petitioner's appeal, and denying both her petition and supplemental petition for discretionary review is reported at _____ N.C. App. _____, _____ S.E.2d _____ and is reprinted in the Appendix at 36a-37a.

JURISDICTION

The order of the North Carolina Supreme Court dismissing petitioner's appeal and denying both her petition and supplemental petition for discretionary review was issued on January 4, 1989. Although the case has been remanded for further proceedings on the merits of petitioner's Fifth Amendment claim, no

further review is available in the North Carolina Courts on the sovereign immunity question raised by this petition. On that issue, the judgment below is effectively final for the purposes of 28 U.S.C. sec. 1257(3). See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 481 (1975); Cheshire v. First Presbyterian Church of Raleigh, 225 N.C. 165, 169, 33 S.E.2d 866, 868 (1945); Jenkins v. Wheeler, 81 N.C.App. 512, 513-14, 344 S.E.2d 371, 372 (1986).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

United States Constitution,
Article VI, para. 2

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

42 U.S.C. section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

In November 1984, petitioner began work as a probationary security guard for Winston-Salem State University. (R. at 5) The probationary period lasted nine months. (R. at 13) To become a permanent employee, petitioner was required to pursue certification as a so-called "company police officer." Id. That certification depended, in turn, on petitioner's willingness to submit to a polygraph examination. Id.

The format of that examination is set forth in the record. A standard set of control questions asked at the beginning of the polygraph examination includes the following personal and offensive inquiries: "Last time homo approached U"; "Last child got U sexy"; and, "Not counting masturbation and S.I. with a willing girl, what was the most unusual sex act ever." (R. at 30, Davenport Deposition at 17-24 and Deposition Exhibit 1 at p. 3) Another standard question asks; "right now, are you a card-carrying member of the Communist party." (R. at 30, Deposition Exhibit 1, at p. 4)

Answers to these questions are kept on file indefinitely by the North Carolina Department of Justice. (R. at 30, Davenport Deposition at 41.) Furthermore, persons submitting to polygraph examination for

company police certification are routinely asked to waive their rights against self-incrimination. (R. at 30, Deposition Exhibit 2)

On April 29, 1985, and again on July 25, 1985, petitioner refused to submit to the polygraph examination required by respondents. (R. at 14) Petitioner balked because she had learned that the polygraph examination included highly intrusive and personal questions about sexual practices and preferences. (R. at 2, 5, 9, 11)

Solely for her refusal to submit to these inquiries, petitioner was fired, effective August 13, 1985, (R. at 14), despite her satisfactory job performance. (R. at 30, Lewis Deposition at 9)

Petitioner brought this action in the Forsyth County Superior Court, pursuant to 42 U.S.C. sec. 1983, in May of 1986. (R.

at 1, 8) She claimed that respondents violated her rights under the Fifth, Ninth and Fourteenth Amendments when they fired her because she would not submit to the polygraph examination. (R. at 1-3, 8-10)

In their answer respondents denied violating Petitioner's constitutional rights. (R. at 6, 11) They affirmatively asserted their sovereign immunity. Id. Respondents also claimed that 42 U.S.C. sec. 1983 did not provide a remedy because a state is not a "person" and therefore cannot be held accountable under section 1983 for unconstitutional conduct or policies. Id.

On cross motions for summary judgment the Forsyth County Superior Court granted Petitioner's motion for summary judgment and ordered that she be reinstated with back pay. (R. at 30-31) The court based

its judgment, in part, on the Fifth, Ninth and Fourteenth Amendments to the United States Constitution. (R. at 30) Other bases for the order were grounded in state law.

Respondents appealed to the North Carolina Court of Appeals, which reversed and remanded in an opinion dated September 6, 1988. On the question presented by this petition, the Court of Appeals held that since the State of North Carolina had not waived its sovereign immunity, neither the state university nor any of its employees acting in their official capacities could be held liable for money damages under sec. 1983. (p. 34a) The Court of Appeals held that summary judgment should have been granted in favor of Respondents University of North Carolina and Winston-Salem State University, id, and that back pay, if

recovered on remand, should be awarded against Respondents Fenning and Lewis only in their individual capacities. Id.

The Court of Appeals also reversed the trial court's finding on the privacy issue. Specifically, the Court of Appeals held that "requiring plaintiff to answer questions regarding sexual practices, preferences and partners does not violate her constitutional right to privacy." (p. 28a) In reaching that conclusion, the Court of Appeals purportedly relied on this Court's decision in Bowers v. Hardwick, 478 U.S. 186 (1986). (p. 28a-29a)

Finally, the Court of Appeals remanded for further proceedings on petitioner's Fifth Amendment Claim, because it was unable to determine from the record whether Petitioner would have been fired if in response to the polygraph questions she

had raised her privilege against self-incrimination. (p. 30a-32a)

On January 4, 1989, the North Carolina Supreme Court dismissed petitioner's appeal and denied her applications for discretionary review. (p. 36a-37a)

REASON FOR GRANTING THE WRIT

> The decision of the North Carolina Court of Appeals holding that sovereign immunity shields the State of North Carolina from liability arising from unconstitutional conduct or policies violates the Supremacy Clause, is inconsistent with this Court's section 1983 decisions, and involves an important question of federal law.

Like the Fourteenth Amendment on which it is based, 42 U.S.C. sec. 1983 invokes federal supremacy against state sovereignty. If States, state entities, or state officials in their official capacity

are "persons acting under color of state law", the Supremacy Clause precludes any construction of section 1983 that would allow a state's sovereign immunity to defeat a valid claim. At least since the ratification of the Civil War Amendments, states are without power to decide whether and to what extent they are subject to the United States Constitution and the laws which give it life.

In the decision below the North Carolina Court of Appeals held that the State of North Carolina and state officials in their official capacities are immune from liability under 42 U.S.C. sec. 1983. If Congress intended to include states and state officials in their official capacity as "persons" within the meaning of 42 U.S.C. sec. 1983, it necessarily eliminated sovereign immunity as a defense to

liability for unconstitutional state action. See Owen v. City of Independence, 445 U.S. 622, 647-48 (1979) (By including municipalities within reach of section 1983 Congress abrogated whatever sovereign immunity municipalities possessed.); Felder v. Casey, ___ U.S. _____, 108 S.Ct. 2302, 2309 (1988) (intent of Congress, not states, controls scope of section 1983 liability).

In Will v. Michigan Department of State Police, et al., No. 87-1207, this Court has granted certiorari on the question whether states are "persons" under 42 U.S.C. sec. 1983. The validity of the decision below, then, turns on this Court's resolution of the issue presented in Will. If this Court decides in Will that a state or a state official in her official capacity is a person for purposes

of 42 U.S.C. sec. 1983, this Court should grant certiorari in this case. It would be anomalous, indeed, to hold that a state or a state official sued in her official capacity is a "person" within the meaning of sec. 1983, but allow a state to insulate itself, its agencies and its officials from liability under that section by invoking state common law sovereign immunity.

Whether a State or one of its officials is shielded from responsibility under section 1983 for unconstitutional acts is governed by federal law. Felder v. Casey, 108 S.Ct. at 2309-10; Martinez v. California, 444 U.S. 277, 284 (1980). As explained by the United States Court of Appeals for the Seventh Circuit:

> Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. 1983 ... cannot be immunized by state law. A construction of the federal statute which permitted a state

> immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the Supremacy Clause of the Constitution insures that the proper construction may be enforced.

Hampton v. City of Chicago, 484 F.2d 602, 607 (7th Cir. 1973), cert. denied, 415 U.S. 917 (1974). The foregoing passage was quoted approvingly by this Court in Owen v. City of Independence, 445 U.S. 622, 647 n.30 (1979), and in Martinez, 444 U.S. at 284 n.8.

Just last term, in Felder v. Casey, 108 S.Ct. 2302, this Court held that a state law notice of claim provision may not be applied in a section 1983 action, even if filed in state court. This Court found the notice of claim provision at issue in Felder inconsistent with the remedial objectives of section 1983. Felder, 108 S.Ct. at 2314. Writing for the Court,

Justice Brennan explained:

> [A] state law which immunizes government conduct otherwise subject to suit under 1983 is pre-empted, even where the federal civil rights litigation takes place in a state court, because the application of the state immunity law would thwart the congressional remedy.

Felder, _____ U.S. at _____, 108 S.Ct. at 2307.

In Owen, 445 U.S. at 638 (fn omitted), this Court held that municipalities "may not assert the good faith of [their] officers or agents as a defense to liability under section 1983." This Court explained:

> How 'uniquely amiss' it would be, therefore, if the government itself --'the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct' --were permitted to disavow liability for the injury it has begotten. A

> damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficiency is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed.

Id. at 651 (citations omitted).

Assuming that Will is decided in petitioner's favor, it is critical for this Court to correct the mistaken but nonetheless prevalent view in the lower courts that section 1983 actions brought in state court are subject to state law notions of sovereign immunity. See Hill v. Department of Corrections, 513 So.2d 129, 132 (Fla. 1987); Holloway v. Rogers, 181 Ga. App. 11, 13, 351 S.E.2d 240, 243 (1986); Greene v. Friend of the Court, Polk County, 406 N.W.2d 433, 436 (Iowa 1987); Thiboutot v. State, 405 A.2d 230, 232-33

(Me. 1979) aff'd on other grounds sub nom. Maine v. Thiboutot, 448 U.S. 1 (1980); Khalifa v. State, 397 N.W.2d 383 (Minn.App. 1986); Raman Navajo School Board, Inc. v. Bureau of Revenue, 104 N.M. 302, 306-09, 720 P.2d 1243, 1249-50, cert. quashed, 104 N.M. 201, 718 P.2d 1349, cert. denied sub nom., New Mexico Taxation and Revenue Dept. v. Ramah Navajo School Board, Inc., 479 U.S. 940 (1986); Kristensen v. Stringen, 343 N.W.2d 67, 78 (N.D. 1983); Bagg v. University of Texas Medical Branch at Galveston, 726 S.W.2d 582, 586 (Tex.App. 1987). But see Rogers v. Saylor, 306 Or. 267, _____, 760 P.2d 232, 236-39 (1988) (Supremacy Clause forbids application of state statute conferring partial immunity on municipalities); Thompson v. Village of Hales Corners, 115 Wis.2d 289, ___, 340 N.W.2d 704, 708-10 (1983) (analysis similar

to that followed in Rogers and in this petition).

The confusion on this issue is further illustrated by a series of decisions relying on Eleventh Amendment precedents to support a claim of state sovereign immunity in state court. E.g., Khalifa v. State, 397 N.W.2d 383, 389-90 (Minn.App. 1986); Kristensen v. Stringen, 343 N.W.2d 67, 76-77 (N.D. 1983). Raman Navajo School Board, Inc. v. Bureau of Revenue, 104 N.M. 302, 307-08, 720 P.2d 1243, 1249-50, cert. quashed 104 N.M. 201, 718 P.2d 1349, cert. denied sub nom. New Mexico Taxation and Revenue Dept. v. Raman Navajo School Board, Inc., 479 U.S. 940 (1986). Such reliance is flatly inconsistent with this Court's statement in Maine v. Thiboutot, 448 U.S. 1, 3 n. 7 (1980), that "No Eleventh Amendment question is present, of course,

where an action is brought in a state court since the Amendment, by its terms, restrains only '[t]he judicial power of the United States.'' In short, any decision in Will that states are persons under section 1983 will be substantially undermined unless the decision below is also reviewed and reversed.

CONCLUSION

For the reasons set forth herein, petitioner respectfully requests the Court to issue its writ of certiorari to the North Carolina Court of Appeals to review the judgment of that court in petitioner's case.

Respectfully submitted.

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Dated: April 3rd 1989.

APPENDIX

NORTH CAROLINA	)	IN THE GENERAL COURT
	)	OF JUSTICE
FORSYTH COUNTY	)	SUPERIOR COURT DIVISION
		86 CVS 2609

TOMMIE JEAN TRUESDALE, Plaintiff,	)	
	)	
v.	)	ORDER AND
	)	JUDGMENT
UNIVERSITY OF NORTH CAROLINA, WINSTON-SALEM STATE UNIVERSITY, JAMES W. LEWIS, and ROBERT FENNING, Defendants.	)	

On Tuesday, September 29, 1987, there came on for hearing before the undersigned Judge cross motions for summary judgments submitted by each party to the above litigation. The plaintiff was represented by Mr. B. Ervin Brown, II, of the Winston-Salem Bar. Defendant was represented by Mr. Thomas Ziko, Assistant Attorney General. The Court entertained extensive argument from each attorney. The Court also read the briefs submitted by the

parties and conducted its own independent research into the cases cited and arguments made.

Based upon the pleadings, discovery of record, the argument of counsel and the briefs submitted, the Court hereby enters the following:

CONCLUSIONS OF LAW

1. Plaintiff's termination by defendants from employment for failure to submit to a mandatory polygraph examination as a precondition of continued employment violates her constitutional rights as secured to her by the Fifth, Ninth and Fourteenth Amendments to the United States Constitution and Article I, Section 19 of the North Carolina Constitution, as well as the provisions of 42 U.S.C. section 1983.

2. Separate and apart from plaintiff's constitutional rights, the Court concludes as a matter of law that the

polygraph examination required of plaintiffs and others as a precondition of employment by the State as campus police or security officers (a) fails to comply with the minimum requirements mandated by Warren v. City of Asheville, 74 N.C.App. 402, 328 S.E.2d 859, disc rev den, 314 N.C. 336 (1985); and (b) was required by the state without the requisite statutory authority.

Based upon the foregoing conclusions of law, it is, therefore,

ORDERED, ADJUDGED and DECREED that:

1. the plaintiff's termination by defendants was unlawful and the defendants are ordered to forthwith reinstate her at a rank and pay comparable to that she possessed at the time she was terminated illegally;

2. defendants are ordered to pay plaintiff her back wages from the date of her termination through the date of entry

of this Order;

3. pursuant to the provisions of 42 U.S.C. section 1983 and section 1988, the North Carolina Civil Liberties Union is awarded its attorneys fees and costs. Counsel for plaintiff will submit the appropriate fee petition related thereto within thirty (30) days from entry of this Order.

Entered this the 19th day of October, 1987.

The Honorable William H. Freeman, Jr.
Superior Court Judge

No. 8721SC1218

NORTH CAROLINA COURT OF APPEALS

Filed: 6 September 1988

Forsyth County
No. 86 CVS 2609

TOMMIE JEAN TRUESDALE

V.

UNIVERSITY OF NORTH CAROLINA,
WINSTON-SALEM STATE UNIVERSITY,
JAMES W. LEWIS, and
ROBERT FENNING

Appeal by defendants from Freeman (William H.), Judge. Judgment entered 19 October 1987 in Superior Court, Forsyth County. Heard in the Court of Appeals 3 May 1988.

Moore & Brown, by B. Ervin Brown, II, for plaintiff-appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Thomas J. Ziko, for defendants-appellants.

SMITH, Judge.

Plaintiff instituted this action against Winston-Salem State University (WSSU) alleging that she was employed on 14 November 1984 as a campus security officer. The record discloses that at the time of plaintiff's employment she was informed that prior to becoming a permanent employee she would be a probationary employee for nine months and would be required to take a polygraph examination as part of the requirements for becoming certified as a company police officer. The Attorney General, through the North Carolina Criminal Justice Education and Training Standards Commission, had adopted administrative rules requiring that candidates for certification as company police officers take and successfully pass a polygraph examination. 12 N.C.A.C. .0201

et seq. Plaintiff was informed that if she failed to be certified as a company police officer she could still become a permanent employee if she passed the basic law enforcement officer course and was appointed a special deputy of Forsyth County. Plaintiff agreed to submit to the polygraph examination. On 29 April 1985 and 8 July 1985, plaintiff failed to appear for the scheduled polygraph examinations. She was given time off from work for the first examination. Plaintiff alleges that she refused to take the scheduled polygraph examinations after receiving information that some of the examination questions would address her sexual practices, preferences and partners. On 31 July 1985, defendant notified plaintiff that her employment would be terminated effective 13 August 1985 for insubordination arising out of her refusal to take the polygraph

examination.

Plaintiff alleged in her first claim for relief that WSSU violated her rights as guaranteed by the Fifth, Ninth and Fourteenth Amendments to the United States Constitution and that defendant's actions violated 42 U.S.C. Section 1983. Plaintiff alleged in her second claim for relief that WSSU's acts constituted an unlawful attempt to administer a polygraph examination in violation of 12 N.C.A.C. .0304(a)(1). During oral argument in this court, plaintiff's counsel abandoned this second claim for relief. Plaintiff requested reinstatement to her position with back salary and restoration of all benefits.

WSSU filed an answer which denied the material allegations of plaintiff's complaint. In addition, defendant alleged that: the complaint fails to state a claim upon which relief could be granted and

should be dismissed pursuant to G.S. 1A-1, Rule 12 (b)(6); WSSU is immune from suit under the doctrine of sovereign immunity; WSSU is not a "person" subject to suit under 42 U.S.C. Section 1983; and plaintiff's acceptance of probationary employment constituted a waiver of any rights she might have had to refuse to take the polygraph examination.

On 21 October 1986, plaintiff filed a motion for summary judgment. Thereafter, on 28 August 1987, plaintiff filed an amended complaint naming as additional defendants the University of North Carolina (UNC); Robert Fenning (Fenning), Vice Chancellor for Business Affairs at WSSU; and James W. Lewis (Lewis), Director of Campus Police at WSSU. The material allegations of the amended complaint were essentially the same as those contained in plaintiff's initial complaint. Defendants

filed an answer incorporating the denials and defenses alleged in the original answer. On 15 September 1987, defendants filed a motion for summary judgment. Plaintiff and defendants filed affidavits, exhibits and depositions supporting their respective motions for summary judgment. On 19 October 1987, the trial court granted plaintiff's motion for summary judgment and ordered reinstatement with back wages. In granting plaintiff's motion, the trial court concluded that: plaintiff's termination for refusal to submit to the polygraph examination violated her rights as guaranteed by the Fifth, Ninth and Fourteenth Amendments to the United States Constitution and Article 1, Section 19 of the North Carolina Constitution as well as 42 U.S.C Section 1983; the polygraph examination failed to comply with the requirements of Warren v. City of

Asheville, 74 N.C. App. 402, 328 S.E.2d 859, disc. rev. denied, 314 N.C. 336, 333 S.E.2d 496 (1985); and the polygraph requirement for company police officer certification was without statutory authorization. Defendants appeal assigning as error the court's granting of summary judgment in plaintiff's favor in that (1) there is no constitutional prohibition against the use of the polygraph examination in conducting background examinations of prospective law enforcement officers; (2) plaintiff has alleged no claim for relief under the North Carolina Constitution; (3) plaintiff's discharge did not violate her right to privacy or her privilege against self-incrimination; (4) there is statutory authority for requiring a polygraph examination in this instance; and (5) the trial court had no authority to order defendants to pay plaintiff's back

wages. Additionally, defendants assign error to the trial court's denial of their motion for summary judgment.

We note that the record before this court contains no order permitting plaintiff to file her amended complaint. A plaintiff may amend a complaint once as a matter right at any time before a responsive pleading is served. G.S. 1A-1, Rule 15(a). Thereafter, the rule requires leave of the court to file an amended complaint. Plaintiff's amended complaint was filed some thirteen months after defendant's answer was served. Though we are unable to determine from the record that the court granted leave to file the amended complaint, we choose to address the merits of this case "[t]o prevent manifest injustice." App.R. 2.

We first address defendants' assignments of error to the trial court's

conclusions that the rule in question was adopted without statutory authority and is thus invalid, that the proposed polygraph would not have met the requirements of Warren v. City of Asheville, and that the polygraph examination violates Article I, sec. 19 of the North Carolina Constitution. Neither the complaint nor the amended complaint present these issues. In Moody v. Kersey, 270 N.C. 614, 155 S.E.2d 215 (1967), our Supreme Court held that a "plaintiff must make out [her] case secundum allegata. There can be no recovery except on the case made by [her] pleadings." Id. at 618, 155 S.E.2d at 218 (citations omitted).

> Under North Carolina's "notice theory of pleading," a trial proceeds on the issues raised by the pleadings unless the pleadings are amended. If an issue not raised by the pleadings is tried by the "implied consent" of the parties, the pleadings are deemed amended, as in a contract case in which plaintiff, without

> objection, presents evidence of negligence. When, however, the evidence used to support the new issue would also be relevant to support the issue raised by the pleadings, the defendant has not been put on notice of plaintiff's new or alternate theory. Therefore, defendant's failure to object does not constitute "implied consent."

Gilbert v. Thomas, 64 N.C. App. 582, 585, 307 S.E.2d 853, 855-56 (1983) (citations omitted). In the instant case, the evidence which would support the contentions that the administrative rule was adopted without statutory authorization, did not meet the requirements of Warren v. City of Asheville, and was adopted in violation of the North Carolina Constitution would also support plaintiff's allegations that defendants' actions violated plaintiff's rights as guaranteed by the United States Constitution and 42 U.S.C. Section 1983. Thus, there was no implied consent to

determine the additional issues. Those portions of the trial court's judgment concluding that the administrative rule was not authorized by statute, that the proposed polygraph examination would not meet the requirements of Warren v. City of Asheville and that the rule violates the North Carolina Constitution are reversed.

Next we address the contention of defendants UNC and WSSU that the trial court erred in granting summary judgment for the plaintiff and failing to grant summary judgment for them for the reason that the State has not waived its sovereign immunity in actions brought pursuant to 42 U.S.C. Section 1983. A trial court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and

that any party is entitled to judgment as a matter of law." G.S. 1A-1, Rule 56(c); Kessing v. Mortgage Corp., 278 N.C. 523, 180 S.E.2d 823 (1971). If the pleadings and proof establish that no claim for relief exists, summary judgment is proper. Coleman v. Cooper, 89 N.C. App. 188, 366 S.E.2d 2, disc. rev. denied, ___ N.C. ___, ___ S.E.2d ___ (1988). In ruling on the motion, the court must consider the evidence in the light most favorable to the non-movant. Walker v. Westinghouse Electric Corp., 77 N.C. App. 253, 335 S.E.2d 79 (1985), disc. rev. denied, 315 N.C. 597, 341 S.E.2d 39 (1986). The non-movant must be given all favorable inferences which may reasonably be drawn from the facts proffered. English v. Realty Corp., 41 N.C. App. 1,, 254 S.E.2d 223, disc. rev. denied, 297 N.C. 609, 257 S.E.2d 217 (1979); Whitley v. Cubberly, 24

N.C. App. 204, 210 S.E.2d 289 (1974). Therefore, any documents presented which support the movant's motion must be strictly scrutinized while the non-movant's papers are regarded with indulgence. Miller v. Snipes, 12 N.C. App. 342, 183 S.E.2d 270, cert. denied, 279 N.C. 619, 184 S.E.2d 883 (1971).

It has long been the rule in this State that the doctrine of sovereign immunity prevents the State or any of its agencies from being sued without its consent. E.g., Insurance Co. v. Gold. Commissioner of Ins., 254 N.C. 168, 118 S.E.2d 792 (1961). Plaintiff contends that G.S. 116-3 which provides in part that UNC "shall be able and capable in law to sue and be sued in all courts whatsoever" abolishes the doctrine of sovereign immunity insofar as UNC and its constituent institutions are concerned. We do not

agree. The purpose and intent of G.S. 116-3 is to allow UNC and its constituent institutions to sue and be sued in their own names but only as otherwise specifically provided by law. We do not believe that the General Assembly intended to abolish the doctrine of sovereign immunity. In MacDonald v. University of North Carolina, 299 N.C. 457, 263 S.E.2d 578 (1980), our Supreme Court held dismissal under the doctrine of sovereign immunity was proper in a suit on an employment contract against the University of North Carolina at Chapel Hill. The University of North Carolina at Chapel Hill and WSSU enjoy identical status under state law. G.S. 116-4. Thus, the doctrine of sovereign immunity will bar any action against UNC or WSSU.

We are aware of Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976), in which

the defense of sovereign immunity was abolished in breach of contract actions. In this case, however, there is no allegation or contention that plaintiff had any contract. Thus, we conclude that the lower court erred in granting plaintiff's motion for summary judgment insofar as UNC and WSSU are concerned. Rather, we hold that summary judgment should have been granted in favor of these two defendants.

Defendants UNC and WSSU further contend that the trial court erred in granting plaintiff's motion for summary judgment against the two institutions in that they are not "persons" within the meaning of 42 U.S.C. Section 1983. In light of our ruling with regard to sovereign immunity, it is not necessary to address this contention.

Next defendants assign as error the award of back pay to plaintiff. Neither

the complaint nor the amended complaint indicates whether defendants Fenning and Lewis are being sued in their official capacities or individual capacities or both. The judgment of the trial court also fails to make this distinction. We therefore first address the issue as if the monetary award for back pay was against the two named individuals in their official capacities. Our Supreme Court has held that when an action is brought against individual officers in their official capacities, the action is one against the State for the purposes of applying the doctrine of sovereign immunity. Insurance Co. v. Unemployment Compensation Com., 217 N.C. 495, 8 S.E.2d 619 (1940). We hold that there can be no award of monetary damages against a State employee in his official capacity. Such an award would, in essence, be an award against the State

since it would be paid from the State treasury. We are cognizant of G.S. 143-300.6 which provides for payment by state agencies of any judgment or settlement against a state employee. However, this statute specifically states that it shall not be deemed to waive the sovereign immunity of the State. Because sovereign immunity has not been waived by the statute, there can be no monetary recovery against defendants Fenning and Lewis in their official capacities.

We next address the monetary award as if defendants Lewis and Fenning are being sued in their individual capacities. It is well established in federal courts that state officials sued in their individual capacities may be liable for monetary damages. Kentucky v. Graham, 473 U.S. 159, 87 L.Ed.2d 114, 105 S.Ct. 3099 (1985). See Ex Parte Young, 209 U.S. 123, 52 L.Ed. 714.

28 S.Ct. 441 (1908). Even then, however, the officials may assert the defense of qualified immunity. Wood v. Strickland, 420 U.S. 308, 43 L.Ed.2d 214, 95 S.Ct. 992, reh'g denied, 421 U.S. 921, 43 L.Ed.2d 790, 95 S.Ct. 1589 (1975). Paxman v. Campbell, 612 F.2d 848 (4th Cir. 1980), cert. denied, 449 U.S. 1129, 67 L.Ed.2d 117, 101 S.Ct. 951 (1981). To raise the defense, which does not apply to injunctive relief, the challenged conduct must not have violated a clearly established constitutional right of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982).

In Wood v. Strickland, supra, the Supreme Court held that an official was not entitled to good-faith immunity "if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the

constitutional rights of the [person] affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury." Id. at 322, 43 L.Ed.2d at 225, 95 S.Ct. at 1001. From the record before us, we are unable to determine whether or not either of the two state officials knew or reasonably should have known that plaintiff's rights as guaranteed by the United States Constitution and 42 U.S.C. Section 1983 might be violated by the administering of the polygraph examination. Therefore, the trial court erred in granting summary judgment and awarding back pay to plaintiff against Fenning and Lewis in their individual capacities.

Next we address the trial court's granting of prospective injunctive relief against Fenning and Lewis in their official capacities. The trial court's judgment

required plaintiff's reinstatement. In Snuggs v. Stanly Co. Dept. of Public Health, 310 N.C. 739, 314 S.E.2d 528 (1984), the Supreme Court held that a section 1983 action could be maintained in the state courts. This court has previously ruled that when a State employee asserts civil rights violations under section 1983 for wrongful dismissal, the court retains its traditional power to grant injunctive relief. Williams v. Greene, 36 N.C. App. 80, 243 S.E.2d 156, disc. rev. denied and appeal dismissed, 295 N.C. 471, 246 S.E.2d 12 (1978).

We find it helpful to review federal cases in deciding the appropriate remedy for unlawful discharge from employment. It has been held that prospective injunctive relief, in this case reinstatement, is the appropriate remedy in 1983 actions. Quern v. Jordan, 440 U.S. 332, 59 L.Ed.2d 358, 99

S.Ct. 1139 (1979); Edelman v. Jordan, 415 U.S. 651, 39 L.Ed.2d 662, 94 S.Ct. 1347, reh'g. denied, 416 U.S. 1000, 40 L.Ed.2d 777, 94 S.Ct. 2414 (1974); Skehan v. Board of Regents of Bloomsburg State Col., 590 F.2d 470 (3d Cir. 1978), cert. denied, 444 U.S. 832, 62 L.Ed.2d 41, 100 S.Ct. 61 (1979). Ordinarily, the Eleventh Amendment would bar actions in federal court when the State is the real party in interest. An exception to this rule arises, however, when there is a constitutional attack on the official action. Ex parte Young, supra. A suit challenging the validity of a state official's actions on federal grounds is not considered a suit against the state. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 79 L.Ed.2d 67, 104 S.Ct. 900 (1984). The theory supporting this fiction is that a state may not authorize its officials to violate

federal law. Id.; Young, supra. Even though we believe that sovereign immunity ordinarily protects the individual defendants acting in their official capacities, we hold that in section 1983 actions in which prospective injunctive relief is sought, sovereign immunity is pre-empted by federal law. Felder v. Casey, ___ U.S. ___, ___ L.Ed.2d ___, 108 S.Ct. 2302 (1988). In Felder, the United States Supreme Court held that state substantive law which conflicts with the remedial objective of section 1983 and "will frequently and predictably produce different outcomes in [section] 1983 litigation based solely on whether the claim is asserted in state or federal court . . . is pre-empted." Id. at ___, ___ L.Ed.2d at ___, 108 S.Ct. at 2307. Therefore, we hold that plaintiff may be entitled to prospective injunctive relief

in State court against defendants Fenning and Lewis in their official capacities to the same extent as in federal court. Lastly, we address the trial court's conclusion that defendants' actions in requiring the polygraph examination violated plaintiff's rights as guaranteed by the Fifth, Ninth and Fourteenth Amendments to the United States Constitution and also violated 42 U.S.C. 1983. In this regard, defendants assert that plaintiff has no constitutional right to refuse to take the polygraph examination. However, defendants misstate the issue. The central issues are whether the questions violate the plaintiff's right to privacy and whether plaintiff can be required to surrender her privilege against self-incrimination.

The control questions which are asked prior to the administering of the actual

polygraph examination include questions relating to theft, prior commission of crimes, homosexual activity, sexual arousal by contact with children, unusual sex acts and anti-governmental activity. The actual polygraph questions, which are only thirteen in number, are designed to determine if the applicant was untruthful on the application for employment or in answering the control questions.

Requiring plaintiff to answer questions regarding sexual practices, preferences and partners does not violate her constitutional right to privacy. The control questions address homosexual activity, sexual arousal by viewing children, sexual contact with minors and unusual or unnatural sex acts. There is no fundamental right to engage in homosexual activity. Bowers v. Hardwick, 478 U.S. 186, 92 L.Ed.2d 140, 106 S.Ct. 2841, reh'g.

denied, ___ U.S. ___, 92 L.Ed.2d 779, 107 S.Ct. 29 (1986). The right to engage in such activities is not entitled to heightened judicial protection as a fundamental liberty "'implicit in the concept of ordered liberty.'" Id. at 191, 92 L.Ed.2d at 146, 106 S.Ct. at 2844, quoting Palko v. Connecticut, 302 U.S. 319, 325, 82 L.Ed. 288, 292, 58 S.Ct. 149, 152 (1937). The other sexual activities addressed by the control questions are likewise not entitled to protection as a fundamental right. The fundamental rights entitled to protection under the right to privacy, including family relationships, marriage or procreation, bear no resemblance to the right to engage in the activities in question. See Bowers v. Hardwick, supra. Thus, the trial court erred in concluding that the polygraph examination violated plaintiff's

constitutional right to privacy.

Next we address plaintiff's contention that the polygraph examination would have violated her privilege against self-incrimination. In the case at bar the undisputed facts show that had plaintiff attended either of the scheduled polygraph examinations she would have been asked to sign a form which states in part the following:

> I fully realize that: I am not required to take this examination, I may first consult with an attorney or anyone I wish before either signing this form or taking the examination, I have the right to remain silent the entire time I am here, anything I may say can be used against me in any court of law, I have the right to talk to a lawyer for advice before answering any questions and to have him present during questioning. If I can not afford an attorney and desire one, an attorney will be appointed for me before any questioning if I wish. If I decide to answer questions now without a lawyer present, I will still have the right to stop answering at any time. I also

> have the right to stop answering at any time until I have talked to a lawyer, and I have the opportunity to exercise all these rights at any time I wish during the entire time I am here.

If plaintiff had been required to answer narrow and specific questions relating to performance of her duties as a security officer without being required to waive her immunity as to subsequent prosecution, there would be no violation of the privilege against self-incrimination. Gardner v. Broderick, 392 U.S. 273, 20 L.Ed.2d 1082, 88 S.Ct. 1913 (1968); Warren v. City of Asheville, supra.

> The privilege against self-incrimination, limited by its terms to "any criminal case," does not prevent a governmental unit from taking non-criminal disciplinary action against an employee on the basis of compelled testimony. . . . [H]owever, . . . a governmental unit which requires an employee to make potentially incriminating statements may not burden the employee's right to exercise the privilege in a later criminal proceeding by threatening to

> discipline or discharge the employee if he or she refuses to waive it.

Hester v. City of Milledgeville, 777 F.2d 1492, 1495-96 (11th Cir. 1985), reh'g denied, 782 F.2d 180 (11th Cir. 1986).

However, we are unable to determine from the record before us whether plaintiff would have been dismissed from employment had she appeared for the polygraph examination and exercised her privilege against self-incrimination. For this reason, that portion of the court's order granting summary judgment and injunctive relief to plaintiff, even if against defendants Fenning and Lewis in their official capacities, must be reversed. On remand, the trial court must determine the consequences to plaintiff had she exercised her privilege against self-incrimination. We also hold that even should reinstatement be ultimately ordered, it would have to be

subject to the condition that plaintiff otherwise comply with the requirements for employment which were that she pass the basic law enforcement course and be sworn in as a special deputy.

We do not believe that plaintiff is entitled to any greater relief in a section 1983 action brought in the state courts than she could obtain in federal court. The effect of this decision is to insure that plaintiff's relief, if any, will be the same that she might have in federal court under 42 U.S.C. Section 1983. We note that in federal court the Eleventh Amendment to the United States Constitution would mandate the same result we have reached in this case. See Quern v. Jordan, supra; Edelman v. Jordan, supra; Skehan v. Board of regents of Bloomsburg State Col., supra; Thonen v. Jenkins, 517 F.2d 3 (4th Cir. 1975); Brennan v. University of

Kansas, 451 F.2d 1287 (10th Cir. 1971).

In summary we hold that: (1) summary judgment should have been granted for UNC and WSSU on all claims for relief; (2) the trial court must determine whether plaintiff would have been discharged from her employment had she appeared for the polygraph examination and exercised her privilege against self-incrimination; (3) monetary damages (back pay), if recovered, may only be assessed against defendants Fenning and Lewis in their individual capacities and may be subject to be defeated by the doctrine of qualified immunity; and (4) prospective injunctive relief may only be granted, if at all, against defendants Fenning and Lewis in their official capacities. Having determined that the trial court erred in granting plaintiff's motion for summary judgment, we find it unnecessary to address

other contentions of the parties.

For the reasons given, the trial court is reversed.

Reversed and remanded.

Judges JOHNSON and PHILLIPS concur.

No. 438P88 TWENTY-FIRST DISTRICT

SUPREME COURT OF NORTH CAROLINA

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TOMMIE JEAN TRUESDALE

V

UNIVERSITY OF NORTH CAROLINA, WINSTON-SALEM STATE UNIVERSITY, JAMES W. LEWIS, AND ROBERT FENNING

From Forsyth

(8721SC1218)

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ORDER

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by Plaintiff in this matter pursuant to G.S. Section 7A-30, the following order was entered and is hereby certified to the North Carolina Court of Appeals: the appeal is

> "Dismissed by order of the court in conference, this the 4th day of January 1989.
>
> s/ Whichard, J.
> For the Court"

Upon consideration of the petition filed by Plaintiff in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the

North Carolina Court of Appeals:

> "Denied by order of the Court in conference, this the 4th day of January 1989.
>
> s/ Whichard, J.
> For the Court"

Upon consideration of the supplemental petition filed by Plaintiff in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

> "Denied by order of the Court in conference, this the 4th day of January 1989.
>
> s/ Whichard, J.
> For the Court"